St. Luke's Hospital *and* Hospital & Health Care Workers Union, Local 250, Service Employees International Union, AFL–CIO. Case 20–CA–24660

July 19, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On May 20, 1993, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] only to the extent consistent with this Decision and Order, and to adopt the recommended Order as modified.

The pertinent facts, as more fully set forth in the judge's decision, are as follows. At all times relevant to this case, the Union has represented separate units of service and maintenance and clerical employees. On May 1, 1992,[2] during bargaining for a successor to the 1990–1992 contract covering the service and maintenance unit and an initial contract for the clerical unit, the Respondent unilaterally modified its dress code to provide, in pertinent part, that ''the following items are not considered appropriate for the work environment: sneakers, sandals, clogs, hats, political/personal statement buttons/pins.''[3]

A significant issue in the then-pending contract negotiations was the Respondent's proposed health benefits for unit employees. The Union was opposed to the Respondent's proposals, and on May 13 the Union sponsored the wearing by employees of 2-1/4-inch round buttons, with a red background and conspicuous white and black lettering, which read ''United To Fight For Our Health Plan.'' Also on May 13, the Union sent the Respondent a letter protesting the unilateral implementation of the new dress code. On May 15, the Respondent's bargaining representative advised the Union, during a negotiating session, that the Hospital's chief executive officer was upset about the buttons.

On May 18, the Respondent stated in its internal newsletter that, pursuant to the revised dress code,

> personal statement buttons which may be considered controversial in nature are not considered appropriate for the work place.
>
> While the hospital does not object to employees wearing union buttons which indicate that they are a member of a union, it does object to buttons which appear to place the hospital and its employees at odds with each other. The buttons bearing the statement ''United to Fight for our Health Plan'' are considered to be controversial and are not acceptable. Wearing these or other controversial buttons are [sic] against our Dress and Appearance Policy and are [sic] not allowed to be worn on hospital time.

Thereafter, the Union distributed to its members rectangular adhesive stickers, about 2 by 4 inches, bearing the same legend as the buttons referred to above. The Union also distributed 2-1/4-inch round stickers which read ''Local 250 United June 1.''

On May 18, the Respondent directed Licensed Vocational Nurse Sanchez to remove from her uniform the 2-by-4 inch ''United to Fight for our Health Plan'' sticker described above under threat of suspension or termination. Sanchez testified that she was standing at a nurse's station at the time of this incident, and that she complied with her supervisor's directive. Likewise, on May 21, clerical employee Martinez was directed to remove a ''United to Fight for our Health Plan'' sticker from his clothing while he was standing in the fileroom. Martinez also complied with this directive.

Prior to these events, the Respondent permitted and even promoted the wearing by employees of other buttons, such as buttons celebrating National Nurse's day, ''Cheers to Volunteers'' buttons acknowledging the Hospital's volunteers, and buttons with the acronym HOCSUM (Hospital of Choice South of Market [street]). Additionally, however, in the fall of 1991, the Respondent directed an employee to remove a political button supporting one of the candidates in a mayoral election.

The judge found that the Respondent lawfully banned the wearing of the ''United to Fight for our Health Plan'' buttons and stickers. In the judge's view, the prohibition was motivated solely by ''a good-faith motive of attempting to insulate patients and visitors from labor relations disputes between the employees and management.'' The judge noted, in this regard,

[1] For the reasons stated by the judge, we find that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally implementing the revised dress code on May 1. Contrary to the judge, however, we find that the appropriate remedy for this violation requires that we order the Respondent to, on request, rescind the unlawfully implemented dress code, and we shall modify the judge's recommended Order and substitute a new notice accordingly. See *Holladay Park Hospital*, 262 NLRB 278 (1982).

[2] Unless otherwise noted, all dates hereafter are in 1992.

[3] Prior to May 1, the dress code provided that ''Employees of the Hospital are expected to maintain a professional and 'business-like appearance' in their attire consistent with their department-approved dress requirements, and at no time will shorts, jeans, sneakers, or ballcaps be allowed.'' At that time, the dress code did not contain any provisions regarding buttons or pins.

that the Respondent had never allowed any ''arguably controversial'' buttons to be worn and had permitted the wearing of union insignia which were not controversial in nature. The judge further stated that, while most patients and visitors likely would not attribute any ominous significance to the word ''fight'' on the buttons/stickers, it was reasonable to assume that some might. Accordingly, the judge found that the prohibition was responsive to legitimate business concerns and was not motivated by antiunion considerations, and hence was lawful.

As noted above, we have adopted the judge's finding that the Respondent unlawfully implemented its revised dress code, which included the ban on ''personal/political statement buttons/pins.'' Contrary to the judge, we find that, even without regard to the dress code's unilateral implementation, the Respondent independently violated Section 8(a)(1) by prohibiting employees from wearing the ''United to Fight for our Health Plan'' buttons and stickers under the circumstances of this case.

Initially, it is evident that the pins and stickers were worn by employees in an effort to encourage their coworkers to support the Union's bargaining position and, hence, constituted protected, concerted activity. *Holladay Park Hospital*, above at 278–279. It is well-settled that the wearing of such insignia may not be prohibited unless the employer establishes that ''special circumstances'' are present which justify the restriction. *Albertsons, Inc.*, 300 NLRB 1013, 1016 (1990); *Holladay Park Hospital*, above at 279.[4] For the reasons which follow, we find that the Respondent has not established that such special circumstances exist in this case.

The Respondent contends that the ''United to Fight for our Health Plan'' buttons may lawfully be banned because of the possibility that patients would be upset by the implicit message that the Respondent and its employees are ''at odds'' with each other. Contrary to the judge, we find that the Respondent has not established that ''special circumstances'' exist in this regard. Although the judge found that some patients might be upset by the buttons in the manner suggested by the Respondent, the record is devoid of any evidence to support this supposition. Thus, there is no evidence that any patient complained of, or even noticed, the stickers and buttons at issue in this case. See *London Memorial Hospital*, 238 NLRB 704, 708 fn. 11 (1978) (employer's claim of special circumstances rejected, where no evidence offered to show that patients were upset by button). Under these circumstances, and noting that the message conveyed by the buttons is not alleged to have been vulgar, obscene, or to have disparaged the Respondent's services, we find that the Respondent's prohibition of the ''United to Fight for our Health Plan'' buttons and stickers violated Section 8(a)(1).[5]

[4] Contrary to the judge, in establishing a violation of Sec. 8(a)(1) it is unnecessary to show that an employer's actions were motivated by a desire to chill the exercise of Sec. 7 rights; rather, the test is whether the employer's conduct reasonably tends to interfere with the free exercise of employee rights under the Act. See, e.g., *Roadway Express*, 250 NLRB 393 (1980).

ORDER

The National Labor Relations Board adopts the order of the administrative law judge as modified below and orders that the Respondent, St. Luke's Hospital, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following new paragraph 1(c).

''(c) Prohibiting its employees from wearing union insignia on their uniforms at work.''

2. Add the following as paragraph 1(d).

''(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

3. Add the following new paragraph 2(a) and reletter the subsequent paragraphs.

''(a) On request, rescind its unilaterally implemented dress code.''

4. Substitute the attached notice for that of the administrative law judge.

MEMBER DEVANEY, concurring.

I agree with my colleagues that the Respondent's ban on ''controversial'' buttons, including the ''United to Fight for our Health Plan'' buttons distributed by the Union in May 1992 violated Section 8(a)(5) and (1) for the reasons stated in the majority decision. I further agree with my colleagues that the ban on wearing the ''United to Fight'' buttons violated Section 8(a)(1). In finding this latter violation, unlike my colleagues, I would also rely on the Respondent's having discriminatorily allowed employees to wear other buttons while on duty.

As my colleagues note, a ban on wearing union insignia like the ''United to Fight'' button is unlawful unless the Respondent establishes ''special circumstances'' which justify the restriction on Section 7 rights. *Holladay Park Hospital*, 262 NLRB 278 (1982). Where, as here, a health care employer claims that the ban is motivated by a legitimate need to protect its patients from controversial issues, one factor in determining whether ''special circumstances'' exist is the reasonableness of the employer's assertion that the button in question will be disruptive. For the reasons stated

[5] In light of this finding, we find it unnecessary to pass on the General Counsel's additional argument that the ban on wearing the ''United to Fight'' buttons was unlawful based on his contention the Respondent discriminatorily allowed other buttons to be worn.

in the majority opinion, I agree with my colleagues that the Respondent has not satisfied its burden in this regard.

However, the Board has also evaluated an employer's assertion of special circumstances with respect to union insignia in light of its treatment of other buttons and insignia. Thus, the Board has held that

> even though a health care employer claims to be motivated by a legitimate need to protect its patients from controversial issues, the Board will not find such 'special circumstances' justifying a prohibition against wearing union insignia if the employer has discriminatorily enforced its dress code to allow employees to wear other types of buttons or attachments.

Holladay Park Hospital, above at 279 (1982) (finding that ban on yellow union ribbons was unlawful, where employer previously allowed other ribbons to be worn at holidays and distributed itself buttons reading ''Holladay Park Hospital On the Move'').

In this case, the Respondent allowed, and even encouraged, the wearing by employees of other buttons, such as buttons celebrating National Nurse's day, ''Cheers to Volunteers'' buttons acknowledging the hospital's volunteers, and buttons with the acronym HOCSUM (Hospital of Choice South of Market [Street]). Under these circumstances, I would find that the Respondent's disparate and discriminatory prohibition of the ''United to Fight for our Health Plan'' buttons further, and independently, demonstrates the absence of any special circumstances which would justify its actions. See *London Memorial Hospital*, above (employer's ban on union buttons unlawful, where ''I Care'' buttons previously distributed by employer); *Baptist Memorial Hospital*, 225 NLRB 525 fn. 3 (1976), modified after remand 242 NLRB 642 (1979) (employer allowed employees to wear ''United Fund'' buttons); *St. Joseph's Hospital*, 225 NLRB 348 (1976) (employer sponsored buttons for hospital week and doctor's day, and allowed buttons on holidays).[1]

[1] Contrary to the judge, it is irrelevant that the Respondent allowed employees to wear other union insignia which it deemed acceptable, *Holladay Park Hospital*, above at 279, or that the Respondent, on one occasion, prohibited an employee from wearing a political button relating to a local election campaign. *London Memorial Hospital*, above at 709.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through any representative of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally modify our dress and appearance policy for employees in the appropriate units of service/maintenance employees and clerical employees represented by Hospital & Health Care Workers Union, Local 250, Service Employees International Union, AFL–CIO.

WE WILL NOT, prior to providing the Union with notice and an opportunity to bargain over the matter, enforce a unilaterally revised dress and appearance policy by advising employees in the above units that they will be subject to discipline or discharge in the event they refuse to remove certain union buttons or stickers from their clothing.

WE WILL NOT prohibit our employees from wearing union insignia on their uniforms at work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, rescind the modifications to our dress and appearance policy promulgated on May 1, 1992.

ST. LUKE'S HOSPITAL

Donald R. Rendall, Esq., for the General Counsel.
J. Mark Montobbio, Esq. (Proskauer, Rose, Goetz & Mendelsohn), of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in San Francisco, California, on March 9, 1993. The charge was filed by Hospital & Health Care Workers Union, Local 250, Service Employees International Union, AFL–CIO (the Union), on May 21, 1992. Thereafter, on July 1, 1992, the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by St. Luke's Hospital (the Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The complaint was amended at the hearing. The Respondent's answer to the complaint, timely filed, denies the commission of any unfair labor practices.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Following the close of the hearing, briefs have been received from counsel for the General Counsel and counsel for the Respondent.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California not-for-profit corporation, with an office and place of business located in San Francisco, California, where it is engaged in the operation of an acute care hospital. In the course and conduct of its operations, the Respondent annually derives gross revenues in excess of $250,000, and annually purchases and receives goods or materials valued in excess of $5000 which originated from points outside the State of California.

It is admitted, and I find, that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the above-named Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(1) of the Act by prohibiting employees from wearing union buttons or stickers which it deemed to be inappropriate for the workplace, and whether the Respondent has violated Section 8(a)(5) and (1) of the Act by promulgating a new dress and appearance policy without affording the Union a timely opportunity to bargain about the matter.

B. *The Facts*

The Union herein is the certified collective-bargaining representative for two different units of employees, namely, the service/maintenance unit and the clerical unit. The collective-bargaining agreement for the service/maintenance unit extended from May 1, 1990, to April 30, 1992; the certification for the clerical unit was issued on September 27, 1991. In May 1992,[1] the parties were engaged in simultaneous collective-bargaining negotiations for both units: the service/maintenance contract, having expired, had been extended pending agreement upon a successor contract, and negotiations for an initial clerical contract had previously commenced.

One of the major issues involved in negotiations was the matter of health insurance. The Respondent was seeking to provide the employees in both units with a health insurance plan that the Union considered to be more costly to the employees, and which contained inferior benefits than previous plans. In order to demonstrate the employees' resolve and solidarity with regard to this issue, the Union's bargaining committee decided to distribute buttons to be worn by all of the employees in both units. The buttons, which do not contain the name of the Union and therefore would not necessarily cause any reader to believe that a union was involved in the matter, are about 2-1/4 inches in diameter, with a red background and large, highly conspicuous white and black lettering, and bear the following language:

UNITED
TO FIGHT
FOR OUR
HEALTH PLAN

In 1984, the Respondent had established a policy and procedure with the heading ''Employee Dress and Appearance.'' That policy set forth appropriate attire that employees were to wear in order to ''maintain a professional and 'business-like appearance.''' It was updated in February 1990. Prior to the commencement of bargaining in May, the Union had requested and the Respondent had provided various documents embodying the policies and procedures that were then in effect, including the February 1990 dress and appearance document, which contained provisions with regard to personal hygiene, the wearing of uniforms supplied by the Respondent for certain jobs, the wearing of hospital identification badges, and the prohibition of ''shorts, jeans, sneakers, or ballcaps.''

On May 1, the Respondent issued an updated revision of the dress and appearance policy which applied to all employees. The record indicates that on March 1 employees were required to initial a memo indicating that they had read the new dress and appearance policy which was attached to the memo. This revision is considerably more detailed and specific regarding permissible on-the-job attire, and contains the following statement:

> The following items are not considered appropriate for the work environment:
>
> Sneakers Sandals Clogs
> Hats Political/Personal Statement Buttons/Pins

The new dress and appearance policy was published in the May 11 and 18 issues of ''Making the Rounds,'' the Respondent's weekly newsletter. In the May 18 issue the Re-

[1] All dates or time periods hereinafter are within 1992 unless otherwise specified.

spondent's chief executive officer, Jack Fries, authored this explanation of the new policy:

> POLITICAL/PERSONAL STATEMENT BUTTONS
>
> In the May 11th issues of Making the Rounds, the Hospital included a copy of its revised policy pertaining to Employee Dress and Appearance. The primary goal of this policy is to promote a professional looking workforce to those who visit St. Luke's Hospital. One area which merits further explanation is the area regarding the wearing of political or personal statement buttons.
>
> As a non-profit hospital, St. Luke's is unable to promote or show support for any political campaign or activity. Doing so could result in the loss of its non-exempt tax status. Furthermore, the hospital is equally concerned with the impressions formed by visitors to St. Lukes. It is critical that the hospital promote not only a professional image but a positive one as well. Therefore, personal statement buttons which may be considered controversial in nature are not considered appropriate for the work place.
>
> While the hospital does not object to employees wearing union buttons which indicate that they are a member of a union, it does object to union buttons which appear to place the hospital and its employees at odds with one another. The buttons bearing the statement ''United to Fight for our Health Plan'' are considered to be controversial and are not acceptable. Wearing these or other controversial buttons are against our Dress and Appearance Policy and are not allowed to be worn on hospital time.

Prior to May 13, the Union promoted a 1-day ribbon campaign during which employees wore ribbons on their clothing to show their unity and support for the bargaining team. On May 13, the Union began a button campaign, and some of the employees began wearing the buttons described above. At a bargaining meeting on May 15, it was stated by one of the management representatives that the Respondent's chief executive officer, Jack Fries, was upset that such buttons were being worn by hospital personnel. Thereafter, apparently in an effort to circumvent the literal dress and appearance policy prohibition of wearing ''buttons/pins,'' the Union distributed rectangular adhesive stickers to the employees bearing the identical language that was printed on the buttons; the stickers, which are noticeably larger than the buttons, are approximately 2 by 4 inches, and the printing, in large block letters, is larger than the printing on the buttons.

In addition, the Union distributed another sticker to its members. It is round and appears to be about the same size as the button. It is the only one of the buttons/stickers which identifies the Union, and bears the following wording in large block letters:

LOCAL 250
UNITED
JUNE 1

The record contains no further evidence regarding this particular sticker; thus there is no record evidence that the Respondent objected to the employees' wearing of it.

By letter dated May 13, Morton Newman, field representative for the Union, protested the implementation of the new dress and appearance policy. The letter states that the Respondent's prohibition of ''Political/Personal Statements Buttons/Pins'' constitutes an unacceptable change in working conditions and should not be instituted without first proposing it to the Union, and that it also constitutes both an infringement of employees' first amendment rights and an unfair labor practice intended to preclude the Union from bargaining about the matter during the contract negotiations which were then being conducted; further, Newman offered to meet with the Respondent to discuss the ''proposed changes,'' and specifically advised the Respondent to refrain from implementing the proposed dress and appearance policy prior to such meeting.

Two employees, both members of the bargaining committee, one a licensed vocational nurse (LVN) in the service/maintenance unit, and one a clerk in the clerical unit, testified that on about May 18 and 21, respectively, they were confronted by their respective supervisors and instructed to remove the union stickers they were wearing. Both were wearing the larger, rectangular sticker containing the word ''fight.'' They were advised that in the event they refused to remove the stickers as directed they would be subject to discipline and termination. They did remove the stickers and were not disciplined.

Evidence was presented that the Respondent had permitted and had even promoted the wearing of other buttons on employees' uniforms or, in the case of clerical employees, on their shirts, jackets, or blouses. Such buttons promoted National Nurses Day; ''Cheers to Volunteers'' buttons acknowledged the help of hospital volunteers; and both employees and management wore ''HOCSUM'' buttons, which is an acronym for ''Hospital Of Choice South of Market [street],'' as part of a public relations campaign.[2]

Human Resources Director Donna Mayo testified that in the fall of 1991 she directed an employee to remove a political button from her jacket, as buttons in support of political candidates were considered to be controversial. Mayo further testified that while the Respondent has no objection to the wearing of buttons bearing the name of the Union, the word ''fight'' on the button and sticker distributed by the Union to its members was of particular concern, as patients might have some apprehension about the quality of care they were receiving if the hospital administration and the employees were involved in a ''fight.'' However, according to Mayo, buttons simply bearing the name of the Union together with, for example, the word ''solidarity'' rather than the word ''fight,'' would probably not be prohibited.[3]

Since the date of the foregoing incidents the parties have reached agreement on the terms of collective-bargaining agreements for each unit.

The evidence shows that the Respondent did not bargain with the Union prior to revising its dress and appearance policy, and that it unilaterally implemented and enforced the policy despite the Union's admonition that it should not do so prior to bargaining. The Respondent maintains that it had

[2] The sizes of the buttons are not noted on the record.

[3] Mayo was not asked about the Respondent's position with regard to the wearing of the above-described sticker which did not contain the word ''fight.''

the right to unilaterally issue, implement, and enforce such a revised policy as a right of management. In this regard, the management-rights clause of the expired contract, as well as the proposed management-rights clause for both contracts being negotiated in May, provide as follows:

> All rights traditionally exercised by management are reserved by the Employer unless specifically limited by the provisions of this agreement.

C. *Analysis and Conclusions*

In the absence of ''special circumstances,'' employees have a protected right to wear union insignia at work. *Holladay Park Hospital*, 262 NLRB 278 (1982); *Ohio Masonic Home*, 205 NLRB 357 (1973), enfd. 511 F.2d 527 (5th Cir. 1975); *Floridan Hotel of Tampa*, 137 NLRB 1484 (1962). Here, the Respondent acknowledges this right. It has permitted the wearing of buttons identifying the Union as the employees' collective-bargaining agent, and has also permitted the wearing of ribbons, apparently without any printing or legend, as part of the Union's campaign to demonstrate employee solidarity with the Union's bargaining position. It seeks to prevent only the wearing of union insignia which it deems inappropriate, in order to protect its patients and visitors from controversial issues which could effect their perception of the quality of health care the Respondent is providing.

Certainly there may be types of union insignia which are clearly offensive or otherwise inappropriate on their face and which a health care employer or any other employer may disallow in the workplace. For example, it is clear that an employer may require the removal of insignia containing profanity or which may directly point out deficiencies with the health care being provided or service being rendered by the employer. Other insignia may not be as easily characterized. The issue herein is whether the insignia worn by the employees is of such a nature as to warrant the Respondent's prohibition of it in the workplace.[4]

While the Respondent appears to object to both the size of the buttons and stickers and to the size of the lettering, its primary objection is to the language itself, namely the word ''fight.'' Thus, the Respondent maintains that the use of such strong language in characterizing a dispute between the employees and the hospital administration is likely to create an environment whereby patients or visitors may have reason to question the quality of health care being provided by those employees.

There is no evidence that the Respondent, in prohibiting the wearing of the union insignia in question, had other than a good-faith motive of attempting to insulate patients and visitors from labor-related disputes between the employees and management. I find that its prohibition of the buttons and stickers was not designed to thwart the union activities of its employees. Thus, it permitted the wearing of union insignia, including ribbons, which implicitly indicated the employees' support of the Union's bargaining position; and it had never permitted the wearing of any buttons, whether union related or not, which were arguably controversial in any respect. Clearly, all the nonunion-related buttons it permitted and even encouraged the employees to wear were cheerful and noncontroversial and portrayed the Hospital and the Hospital's staff in a favorable light.

While it may be argued that the wearing of a plain ribbon as an implicit indication of solidarity with the Union's bargaining position is tantamount to the wearing of a button or sticker explicitly announcing the existence of a fight or dispute, and that there is no material difference between the two forms of expression, it seems clear that in fact the Union believed there was a difference; indeed, this is apparently why it elected to initiate the button/sticker campaign. The difference is a matter of degree, and the Union, as well as the Respondent, believed that the language on the buttons and stickers presented the issue in a more assertive manner. While it seems reasonable to assume that most hospital patients or visitors would not attach any ominous significance to the word ''fight'' on the buttons or stickers, it is also reasonable that such language could be a genuine cause of concern to some patients or visitors. The Respondent subscribed to this latter point of view and was legitimately concerned that the explicit portrayal of the employees and the administration being at odds to the point of a ''fight'' would adversely effect the public's perception of the health care being provided.

Applicable Board precedent appears to focus on the issue of employer motivation in prohibiting the wearing of union insignia. In this regard an employer's past practice of permitting similar badges, buttons, or pins to be worn in nonunion-related contexts is of singular significance in determining motivation. See *Evergreen Nursing Home*, 198 NLRB 775 (1972); *Ohio Masonic Home*, supra; *St. Joseph's Hospital*, 225 NLRB 348 (1976); *Holladay Park Hospital*, supra. Here, the Respondent has demonstrated that in prohibiting the wearing of the buttons and stickers in question it was responding to a legitimate business concern, and that, as evidenced by its past practice of having never permitted the wearing of any type of insignia which is even arguably similar to the buttons and stickers herein, it was not motivated by a desire to thwart its employees' activities in support of the Union's collective-bargaining position. Further, it has not attempted to prevent employees from wearing other buttons identifying the Union as the employees' collective-bargaining representative, or from wearing ribbons which were specifically for the purpose of indicating employee solidarity with the Union's bargaining position. Accordingly, I conclude that by prohibiting the wearing of the buttons and stickers herein the Respondent has not violated Section 8(a)(1) of the Act as alleged.

The revised dress and appearance policy which the Respondent unilaterally issued on May 1, specifically prohibited the wearing of any ''Political/Personal Statement Buttons/-Pins.'' The preexisting written policy was silent about the wearing of such items. The Union was apparently not apprised of the new policy until it was published in the May 11 issue of ''Making the Rounds,'' and its implementation was immediately protested by Union Field Representative Newman in his May 13 letter to the Respondent; further, Newman demanded that the policy be retracted until negotiations could be held regarding the matter. Insofar as the record evidence shows, the Respondent did not reply to the

[4] The evidence is clear that virtually all the hospital staff, whether in the service/maintenance unit or the office clerical unit, may have contact on a not infrequent basis with patients or visitors in the elevators, hallways, and cafeteria.

Union's letter; not only did it not retract the revised policy pending negotiations, it thereafter threatened employees with discharge for violating the policy.[5]

It is clear that the Respondent intended the policy's proscription of ''Political/Personal Statement Buttons/Pins'' to apply to the buttons and stickers then being worn by the employees, as this is what the Respondent's chief executive officer explicitly stated in the May 18 newsletter article, supra, which was published on the very day that an employee was threatened with discharge if he refused to remove the sticker. At the hearing the Respondent indicated that it may have been amenable to permitting the Union to convey its intended message on union insignia by the use of less forceful or descriptive language. Had bargaining taken place prior to May 18, it is possible that the matter could have been resolved to the mutual satisfaction of the parties; and in this event the Respondent would have had no occasion to threaten its employees with discipline for violating the policy.

The matter of appropriate wearing apparel in the workplace, including the wearing of union-related and other insignia, is a term and condition of employment and, as such, is a mandatory subject of bargaining. See *United Technologies Corp*., 286 NLRB 693, 694 (1987); *Valley Oil Co*., 210 NLRB 370, 379 (1974); *Holladay Park Hospital*, supra at 279. Here, the Respondent gave the Union no opportunity to bargain over the revised dress and appearance policy prior to its implementation, and instituted it as an historic right of management.

In this regard, the Respondent maintains that it had always required employee adherence to an appropriate code of dress, including accessories and emblems, which were conducive to a hospital environment, and therefore it was not obligated to negotiate such matters with the Union. This position is clearly erroneous. Simply because a collective-bargaining representative may have had no quarrel with an employer's past practice in implementing or interpreting its work rules does not in and of itself constitute a waiver of the union's right to bargain over the matter. See *Rockwood & Co*., 285 NLRB 1114, 1117–1118 (1987); *Page Avjet Corp*., 275 NLRB 773, 776, 778 (1985). Cf. *Columbus & Southern Ohio Electric Co*., 270 NLRB 686 (1984). Moreover, the Union immediately requested bargaining when it appeared that the Respondent was attempting to insert new and substantive provisions into its dress code.

Similarly, the Respondent's reliance on the management-rights clause of the expired service/maintenance contract, which had been extended pending agreement on a successor contract, is misplaced. Neither the management-rights provision itself, nor any other contract language, nor the past practice or bargaining history of the parties, constitutes the requisite ''clear and unmistakable'' waiver of the Union's right to bargain over this matter. See *Columbus & Southern Ohio Electric Co*., supra. Indeed, with regard to the newly certified clerical unit, there was no contract in existence and there had been no bargaining history.

On the basis of the foregoing, I conclude that the Respondent has violated Section 8(a)(5) of the Act by unilaterally promulgating and implementing changes to its established dress and appearance policy without first bargaining with the Union. Further, the Respondent linked its prohibition of the buttons and stickers in question to its unilaterally established dress and appearance policy, and then sought to enforce its policy through threats of discipline and discharge prior to timely bargaining over the matter. I therefore find that such threats are derivatively violative of Section 8(a)(1) of the Act.[6]

The complaint, as amended at the hearing, alleges that the Respondent's dress and appearance policy is overly broad. Apparently, it is the General Counsel's contention that the prohibition of ''Political/Personal Statements Buttons/Pins'' would arguably preclude the wearing of types of union insignia which employees have a statutory right to wear. Further, the General Counsel maintains that the policy is not limited to employees who have contact to patients and visitors, but rather also applies to clerical employees or others who may not have such contact.

After establishing the revised policy, the Respondent, in effect, published an interpretation of the policy in its weekly newsletter, ''Making the Rounds.'' Thus, on May 18, the employees were advised that the new language was designed to preclude the employees from wearing union insignia ''which appear to place the hospital and its employees at odds with one another,'' but specifically did not preclude the employees from ''wearing union buttons which indicate that they are a member of a union.'' This seems to provide the employees with reasonable guidance as to the exercise of their Section 7 rights. Therefore I do not conclude that the new policy, as interpreted, is overly broad.

Further, the evidence indicates that any employee, including clerical employees, at any given time, either in an office, an elevator, the hallway, or the cafeteria, may come in contact with a patient or visitor. Accordingly, I do not find that the application of the policy to all employees is overly broad.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally establishing a revised dress and appearance policy containing new provisions, and by enforcing the policy through threats of discipline and discharge, without prior notification to and bargaining with the Union.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related

[5] The record contains no evidence regarding the parties' discussions of this matter, if any, following Newman's May 13 letter. Respondent's brief states:

> While the May 1992 revision was not tied to negotiations, it did occur *during* negotiations. If Local 250 was opposed to any aspect of the Hospital's revised dress policy, it could have proposed new contract language concerning the wearing of political buttons. It did not do so, nor did it even raise the issue of the dress policy during negotiations. [Emphasis in original.]

[6] While the complaint does not specifically allege that the unlawful threats of discipline and discharge flow from the Respondent's refusal to timely bargain over the revised dress code policy, it appears that the matter has been litigated, and that such a finding is warranted.

manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Moreover, the Respondent shall be required to post an appropriate notice, attached hereto as ''Appendix [omitted from publication].''

It appears that the Union has had ample opportunity to bargain over the matter during the course of bargaining for contracts in both units. Thus the parties have entered into collective-bargaining agreements following the dispute herein. Moreover, as discussed above, the revised dress and appearance policy, as interpreted, does not preclude the employees from wearing union insignia. Therefore, I do not deem it necessary, under the circumstances, to recommend that the Respondent rescind its revised dress and appearance policy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, St. Luke's Hospital, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally establishing a revised dress and appearance policy without prior notification to and bargaining with the Union.

(b) Threatening employees with discipline and discharge for violating a unilaterally established dress and appearance policy prior to providing the Union an opportunity to bargain over the matter.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at the Respondent's San Francisco, California facility copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 20, after being duly signed by the Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by the Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''